American Society of International Law

A Case Study in the Soviet Use of International Law: Eastern Poland in 1939
Author(s): George Ginsburgs
Source: *The American Journal of International Law*, Vol. 52, No. 1 (Jan., 1958), pp. 69-84
Published by: American Society of International Law
Stable URL: http://www.jstor.org/stable/2195670
Accessed: 04-01-2016 23:47 UTC

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at http://www.jstor.org/page/info/about/policies/terms.jsp

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

American Society of International Law is collaborating with JSTOR to digitize, preserve and extend access to *The American Journal of International Law.*

http://www.jstor.org

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

A CASE STUDY IN THE SOVIET USE OF INTERNATIONAL LAW: EASTERN POLAND IN 1939

By George Ginsburgs

University of California at Los Angeles

On September 17, 1939, Soviet troops crossed the Soviet-Polish frontier and, advancing rapidly, soon occupied the oft-disputed territory known at various times as Eastern Poland, Eastern Galicia, or Western Ukraine and Western Byelorussia. The groundwork for this move, it is now known, had carefully been laid well in advance, in fact as early as August 23, 1939, when the Secret Additional Protocol to the Soviet-German Treaty of Non-Aggression already hinted at a revision of Poland's status.[1] Thus, the Soviet Union had at its disposal nearly a month during which to prepare its move, and when it finally did take steps to do its share of the work in the "territorial and political rearrangement of the areas belonging to the Polish State," a comprehensive case in international law was advanced in support of the Red Army's advance. The publication of the secret documents from the archives of the German Foreign Office for once affords students of Soviet affairs with an unparalleled opportunity to examine the picture of Soviet diplomacy in action with a knowledge of nearly all the facts surrounding the case. This is what makes the investigation of the Soviet legal case for Western Ukraine and Western Byelorussia so unique.

The essence of the Soviet legal argument in support of its conduct was presented in the note of September 17, 1939, signed by Molotov and communicated by Potemkin to the Polish Ambassador in Moscow, Grzybowski;[2] in Molotov's radio broadcast to the Soviet nation of September 17, 1939;[3] and in the notes handed to all governments maintaining diplomatic relations with the U.S.S.R., also of September 17, 1939.[4] Further elaborations of particular points of the Soviet case were made in Molotov's report "On the Foreign Policy of the Soviet Union" before the extraordinary 5th Session of the Supreme Soviet, October 31, 1939,[5] in his report on the "XXth An-

[1] For text, see Nazi-Soviet Relations, 1939–1941, Documents from the Archives of the German Foreign Office (ed. by R. J. Sontag and J. S. Beddie, Washington, D. C., 1948), p. 78.

[2] Republic of Poland, Ministry for Foreign Affairs, Official Documents Concerning Polish-German and Polish-Soviet Relations, 1933–1939 (The Polish White Book), (London, n.d.), Item No. 175, pp. 189–190; Pravda, Sept. 18, 1939, p. 1.

[3] Pravda, Sept. 18, 1939, p. 1. [4] *Ibid.*

[5] The text may be found in Mirovoe Khozyaistvo i Mirovaya Politika, November, 1939, No. 11, pp. 3–14.

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

niversary of the October Revolution'' before the Moscow Soviet, November 6, 1939,[6] and in a series of articles in *Pravda* and *Izvestiya* after September 18, 1939.

For the purpose of analysis, the substantive content of the Soviet case in international law may conveniently be broken down into categories according to whether the plea invokes: (1) the disappearance through *debellatio* of the Polish state and the Polish Government; (2) the abandonment of Polish territory by its government, giving rise to a case of *derelictio;* (3) self-defense; (4) humanitarian considerations; (5) national self-determination; or (6) the spuriousness of the original Polish title to the area in question.

I. Debellatio

In the words of Dr. Jahrreiss, counsel for the defense at Nuremberg, ''the Soviet Union treated the German-Polish conflict simply according to the rules of classical international law concerning *debellatio.*''[7] The opening paragraph of Molotov's note of September 17, 1939, claimed that:

> Warsaw no longer exists as the capital of Poland. The Polish Government has disintegrated and no longer shows any sign of life. This means that the Polish State and its Government have, in fact, ceased to exist. Therefore the agreements concluded between the U.S.S.R. and Poland have ceased to operate.[8]

And the same claim was reiterated and re-emphasized in Molotov's radio broadcast of the same day:

> Warsaw no longer exists as the capital of the Polish State. No one knows the whereabouts of the Polish Government. . . . The Polish State and its Government have, in fact, ceased to exist. In view of this situation the agreements concluded between the U.S.S.R. and Poland have ceased to operate.[9]

A. *Extinction of the Polish State*

The concept of Poland's disappearance through *debellatio* is the central point on which the entire Soviet case hinges for a number of reasons. The extinction of the Polish state would, as Molotov stressed again and again, legally terminate all the treaties, agreements and conventions signed between the U.S.S.R. and Poland. In the first rank of such documents whose effect would thus be annulled stand the Treaty of Peace signed in Riga, March 18, 1921, by which the frontiers between the parties were con-

[6] *Ibid.* 16–27.

[7] Dr. Hermann Jahrreiss, ''Statement Before the Nuremberg Tribunal,'' Nuremberg, German View of the War Trials (ed. by W. E. Benton and G. Grimm, Dallas, 1955), p. 38.

[8] Polish-Soviet Relations, 1918–1943, Official Documents, issued by the Polish Embassy in Washington by authority of the Government of the Republic of Poland (Washington, D. C., n.d.), Item No. 13, p. 96.

[9] Pravda, Sept. 18, 1939, p. 1.

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

solidated; as between the U.S.S.R. and Poland, the multilateral Protocol of February 9, 1929, putting into force immediately as between the signatories the Treaty of Paris of August 27, 1928, regarding the renunciation of war as an instrument of national policy (The Briand-Kellogg Pact); and, in particular, the Pact of Non-Aggression of July 25, 1932, extended by the Protocol of May 5, 1934, until December 31, 1945, and the Convention Defining Aggression, July 3, 1933. The last two documents listed [10] were concluded expressly to preclude that very action which the U.S.S.R. undertook on September 17, 1939, and, had they been in force, would have branded the Soviet step as in contravention of the U.S.S.R.'s solemnly assumed international obligations and as a violation of binding international agreements. It was thus of crucial importance for the Soviet Union to prove that all these treaties had lost their legal effect and validity, and the path chosen by Molotov was to claim that Poland had ceased to exist as a state, had lost its international legal personality, and, therefore, that all state treaties to which it was a party had lapsed.

In addition to protecting the Soviet Union against the charge of violating its international obligations, the Soviet argument aimed at achieving two additional objectives: (1) to shield the U.S.S.R. against the charge that it initiated and waged an aggressive war, or a war in violation of international treaties, agreements and assurances, a charge subsequently treated under the Charter and the proceedings of the International Military Tribunal at Nuremberg as an international crime, and, more important, contrary to the Marxist tenet that a socialist nation cannot and does not start and carry on aggressions; (2) to permit the U.S.S.R. to claim that the status of Eastern Poland in international law was that of a *res nullius*.

In effect, it is generally recognized that war is a relation between states, and if, as the U.S.S.R. claimed, Poland had ceased to exist as an independent and sovereign state on September 17, 1939, then a state of war could not have arisen between the two countries at the time of the Soviet occupation of the "territory of the former Polish State." The obvious Soviet preoccupation with this problem and its anxiety not to be branded as a belligerent aggressor is clearly illustrated by the fact that on the very same day of the entry of the Red Army into Eastern Poland, conjointly with the Soviet Government's notification of its decision to the Polish Ambassador in Moscow, it also sent notes to all governments maintaining diplomatic representatives in Moscow, re-affirming its neutral position with regard to the European conflict. For example,

> the Soviet Government in the note of explanation sent to the Government of the United States contends its action sending the Red Army into Poland is not belligerent because it holds the Polish Government already had collapsed.[11]

[10] Printed in 27 A. J. I. L. Supp. 188, 192 (1933).

[11] New York Times, Sept. 19, 1939.

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

The legal validity of the insistent Soviet claim that a state of war did not at any time arise between itself and Poland, due to the latter's collapse, was supported by the absence of any declaration of war by either side, and the lack of any widespread military hostilities which might have given grounds to third parties for the recognition of a *de facto* state of belligerency.[12] For all these various reasons, it may safely be concluded that on this particular point the Soviet argument was successful, and that the "above considerations do not allow for any doubt that there did not exist a state of war between Poland and the U.S.S.R. in September, 1939." [13]

B. *Extinction of the Polish Government*

The concept of *debellatio* is well known, to be sure, in international law, but there is also no doubt in international public law that in time of war, where the situation is highly fluid and day-to-day circumstances transitory, the existence of a legally constituted government conjointly with the survival of a portion of the territory of its state free from enemy troops is sufficient evidence for the presumption of the continued existence of the state itself. During the second World War international legal practice went even further and recognized the existence of a state on the basis of a government in exile, supported by a resistance movement at home. Both these views were accepted by the U.S.S.R. and were made part of its diplomatic relations during World War II. As a result, it is quite clear that in international law, on September 17, 1939, the Polish state survived *in toto, de facto* and *de jure,* in the person of its government and the eastern areas still unoccupied by the German armies. Even had the Polish state been entirely extinguished territorially, the title to all Polish lands would still have remained vested in its London Government-in-exile, including the title to Eastern Galicia.

This technical flaw in the Soviet case for Poland's *debellatio* made it imperative for the U.S.S.R. to claim that not only the Polish state, but also

[12] The Polish armies did resist the Soviet troops in certain localities. In the Communiqué issued by the Polish Embassy in London, Sept. 17, 1939, (The Polish White Book, Item No. 178, p. 191), one reads: "On September 17, at 4 a.m., Soviet troops crossed the frontier of Poland at many points and were met immediately with strong resistance on the part of the Polish National Army. A sharp encounter in particular is being fought near the frontier in the region of Molodeczno." However, the brief duration of the military operations and the extent of the Red Army's casualties, officially put by Molotov in his report before the 5th Extraordinary Session of the Supreme Soviet, at 737 killed and 1,862 wounded, make it doubtful whether the scope of the hostilities would warrant recognizing them as constituting a war.

[13] B. Montanus, Polish-Soviet Relations in the Light of International Law 27 (New York, 1944). The author also considers that the reference in the Polish-Soviet Agreement of July 30, 1941, to "amnesty" for Polish "prisoners of war" is "only due to an awkward usage of inappropriate terms."

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

the Polish Government had ceased to exist. The disappearance of the government would automatically void all titles vested in it as the representative of the state, among others the title to Eastern Galicia, and vitiate all otherwise valid assertions that Poland survived in the person of its government and half its territory, or, later, in the person of its Government-in-exile.

To achieve this objective, the Soviet Union appealed not to technicalities, but to common sense and facts. By-passing and ignoring the legal aspects of the internal Polish situation and the *de jure* existence of its legally constituted government, the Soviet case stressed the *de facto* relations within Poland: "No one knows the whereabouts of the Polish Government"; "the Polish State and its Government have, *in fact,* ceased to exist"; Poland was "left to her own devices and bereft of leadership." On this plane of argument the Soviet case was indeed strong. In spite of scattered protests to the contrary,[14] the consensus heavily sides with the Soviet view that by September 17, 1939, the Polish Government was in panic and full flight, that it did not exercise any appreciable control over its armed forces or its remaining territory, and that the days of Poland were indeed numbered.[15]

De facto, then, one may well accept the view that the Polish Government no longer functioned as an effective state power. In such a case the Soviet claim that Eastern Galicia was *in fact* a *terra nullius* may not be unjustified and could be sustained. If one accepts the more controversial Soviet assertion that the Government of Poland had disintegrated and disappeared, implying in addition that all territorial titles vested in it lapsed *de jure* too, then Eastern Galicia may be viewed on September 17, 1939, as *terra nullius* both *de facto* and *de jure.* In such circumstances the Soviet legal title by virtue of effective occupation of abandoned territory would be clear, a highly desirable state of affairs from the Soviet viewpoint. However, by choosing to concentrate his case in this instance on the facts, rather than law, Molotov was able to establish strongly only the *de facto* circumstances, leaving the technically more important *de jure* aspects of the problem untouched and unsolved.

II. Derelictio

In order to compensate for the technical weakness of the Soviet case regarding the legal status of Eastern Poland, the concept of *derelictio* was appealed to for the purpose of buttressing the *debellatio* argument. It should be noted, before proceeding further, that a certain measure of con-

[14] See Final Report, presented by the former Ambassador in Moscow, to the Minister for Foreign Affairs, Paris, Nov. 6, 1939, The Polish White Book, Item No. 184, p. 211; also A. S. Cardwell, Poland and Russia, The Last Quarter Century 50 (New York, 1944).

[15] Among others, Leon Noël, L'agression allemande contre la Pologne 501–503 (Paris, 1946); T. Taylor, Sword and Swastika 334–357 (New York, 1953).

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

tradiction exists in the juxtaposition of the two concepts, and that ordinarily they are used as opposing rather than supplementary or complementary ideas. For if *debellatio* implies the extinction of a state and its government through force of military conquest, *derelictio* in its turn expresses the willful abandonment of title to a territory by a state and government of its own free choice. In spite of this, however, the U.S.S.R. appealed to both arguments simultaneously. At the same time that Molotov stressed the non-existence of the Polish state and all organized authority, he also "motivated the Soviet invasion by *inter alia* the alleged abandonment of Polish territory by the Polish Government," [16] and pointed out that the "population of Poland had been abandoned to its fate by its incompetent leaders." [17] This abandonment, it is implied, constituted a voluntary, tacit renunciation of all rights to Polish lands and an abdication from authority by the Polish Government, turning Eastern Galicia into a legal no-man's land, an international derelict.

In addition, the Soviet argument ran,

> the events following the Polish-German war, have shown the internal non-viability and the obvious impotence of the Polish State. The Polish ruling circles have gone bankrupt.[18]

Poland's military and political defeat at the hands of the Wehrmacht, its "internal bankruptcy," [19] was proof, according to Molotov, that the Polish Government was morally unfit to govern and that it had forfeited all rights to speak for the Polish nation, including, of course, the minorities resident on its Eastern marches. This forfeiture, it was hinted, simply re-enforced the Soviet contention that Eastern Galicia was a territory legally adrift.

Whatever value these Soviet arguments may have had in strengthening the U.S.S.R.'s case concerning the abandonment of Eastern Poland, it must be noted that they went much further than was warranted under the existing rules of general international law on *derelictio,* to the point of either reinterpreting them or revising them. The innovations sponsored by Molotov in his plea on the tacit abandonment of Eastern Poland by its government can hardly be reconciled with the general rule holding that:

> When the thing whose abandonment is alleged in order to legitimize occupation belongs to the dominion of a nation, still more rigorous becomes the necessity of causing the act to rest on some positive and express manifestation of the will of the owner, showing that he does not desire to continue in possession, for in questions of territorial dominion, abandonment is not to be presumed.[20]

[16] The Polish White Book, p. 222.

[17] Molotov's radio broadcast of Sept. 17, 1939, Pravda, Sept. 18, 1939, p. 1.

[18] *Ibid.*

[19] Note of September 17, 1939, The Polish White Book, p. 189.

[20] J. B. Moore, A Digest of International Law, Vol. I, p. 300 (Washington, D.C., 1906).

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

III. Self-Defense

More solid and more acceptable from the point of view of international public law is the Soviet claim that the U.S.S.R. acted in self-defense. Though weakened considerably by the vagueness of the language in which the plea is couched, and by the absence of any indication as to the source of the threat, the Soviet argument nevertheless is subject to two reasonable interpretations. The first envisages self-defense against the dangers inherent in the development of a political vacuum on the frontiers of the Soviet Union at an extremely perilous time and place. This interpretation is supported by the language of the Soviet note of September 17, 1939, to Poland, in which Molotov wrote:

> Left to her own devices and bereft of leadership, Poland has become a suitable field for all manner of hazards and surprises, which may constitute a threat to the U.S.S.R. For all these reasons the Soviet Government, which hitherto has preserved neutrality, cannot any longer observe a neutral attitude towards these facts.[21]

And, in his radio broadcast of the same day, he again emphasized that "a situation has been created in Poland requiring on the part of the Soviet Government particular care in regard to the security of the State."

The right of intervention in self-defense is recognized in international public law, and the development of a situation of chaos and anarchy in the border areas of a state prejudicial to the peace and security of its neighbors is regarded as affording justifiable grounds for interference by the latter, particularly if no immediate remedy to the situation seems to be forthcoming on the part of the offending party.[22] Rendered somewhat controversial by the fact that it gave as its only excuse potential threats to the security of the U.S.S.R. and that it thus implied a preventive intervention, the Soviet case otherwise stood on solid grounds when justifying its action on the basis of the widespread disorders in Eastern Poland.[23]

The second possible interpretation of the Soviet appeal to the principle of self-defense would regard Germany as the source of the impending danger to Soviet security. It is, of course, known that the Soviet Government at one time intended to use this as an official justification for its action, but that it was forced to abandon the idea in the face of adverse reaction by its ally, Germany. In view of the known complicity of the Soviet Union

[21] The Polish White Book, p. 189.

[22] See particularly, R. Redslob, Les principes du Droit des Gens moderne 141, 144 (Paris, 1937); C. G. Fenwick, "Intervention: Individual and Collective," 39 A.J.I.L. 647 (1945).

[23] The Sept. 13, 1939, issue of Pravda, p. 5, carried a TASS dispatch from Berlin, datelined Sept. 12, quoting Transocean, on Rumanian reports from Chernovitz on widespread anti-Polish movements in Eastern Galicia, accompanied by burning and looting of Polish property, and erupting, or expected any moment to erupt, into an armed uprising of Ukrainians and Byelorussians against the Polish Administration.

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

in Germany's plans for Poland, and the established fact that appeal to a German threat was planned as an artificially manufactured pretext by the Soviet Ministry for Foreign Affairs, any reference to self-defense against Hitlerism must be taken with extreme care and more than one grain of salt.[24] However, with all due caution and regard for the above considerations, the Soviet action may still be gauged as a defensive move against its official ally of the moment. Even at the time when the two countries were ostensibly co-operating, a semi-official Soviet source wrote:

> By another swift and brilliant stroke, the Soviet Union moved into Eastern Poland when the Polish Government, lacking support at home and not receiving the support promised by Britain, collapsed. This move cut off Hitler's drive down through Southeastern Europe. It cut off his approach to the Soviet Union through the Baltic.[25]

Another author commented that "the Soviet Union now gains both in time and space."[26] In spite of the fact that the plea of self-defense stands compromised because the Soviet Union knowingly contemplated using it as a convenient pretext for invading Eastern Poland, and even sought Germany's acquiescence in the project, there still remains a possibility that in reality fear of German might did play a major part in the unformulated motivations behind the Soviet occupation of Eastern Galicia.[27]

In this case, though the plea on general grounds of self-defense is acceptable in explanation of the Soviet decision to invade Polish territory, it still meets with a twofold objection: (1) if it is self-defense against Germany, it is legally questionable whether any but the most temporary measures (and certainly not plebiscites and annexations) would be permissible on the territory of a third party, Poland; (2) if it is self-defense against dangerous, or even potentially dangerous, chaos and anarchy in a neighboring state, this would in no way justify the incorporation of the strife-torn area into the intervening country under general rules of international law.

IV. Humanitarian Considerations

Intervention on "grounds of humanity" is well known to international public law and has more than once been used, on the whole successfully, to excuse otherwise unjustifiable interference in the domestic affairs of another state.

[24] See Nazi-Soviet Relations, 1939–1941, pp. 91, 94–96.

[25] The U.S.S.R. and Finland (published by Soviet Russia Today, New York, 1939), p. 34.

[26] I. Lemin, "Torzhestvo Stalinskoi politiki mira" (The triumph of Stalin's policy of peace), Mirovoe Khozyaistvo i Mirovaya Politika, November, 1939, No. 11, p. 82.

[27] For Soviet thoughts along these lines, see Count Szembek's Minute of his Conversation with M. Szaronov, Krzemeniec, Sept. 11, 1939, The Polish White Book, Item No. 173, p. 189. Pravda's issue for Sept. 16, 1939, p. 2, carried a dispatch on the violation of the Soviet frontier by a German plane.

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

> Numerous interventions took place during the nineteenth century upon what were called in a broad way "grounds of humanity." . . . But while differing as to the technical grounds of intervention, jurists found no difficulty in responding to the higher appeal of a common humanity, and in conceding to a State the same right to protect the moral feelings of its people, shocked by the accounts of the massacres of their co-religionists, that it had to protect their material interests.[28]

What 19th-century jurists conceded as a right of states in matters of religion, the Soviet Union demanded in matters of blood ties; instead of protection of co-religionists, it issued an appeal for the protection of ethnical and cultural kinsmen:

> The Soviet Government further cannot view with indifference the fact that the kindred Ukrainian and White Russian people, who live in Polish territory and who are at the mercy of fate, are left defenceless.
>
> In these circumstances, the Soviet Government has directed the High Command of the Red Army to order the troops to cross the frontier and to take under their protection the life and property of the population of Western Ukraine and Western White Russia.[29]

If, indeed, the populations of Poland's eastern areas were in danger, the validity of the Soviet argument must be conceded on the basis of generally recognized rules of international law. As to the perils threatening the "kindred Ukrainian and White Russian people," one may either interpret these as arising from the state of anarchy and chaos officially claimed to be reigning in the area following Poland's collapse, or, as implied *sotto voce,* inherent in the imminent occupation of the territory by the victorious German troops.

In either case, the *de facto* situation in Eastern Poland, and the existence therein of large minorities of Ukrainian and Byelorussian stock related to the populations of the Ukrainian and White Russian S.S.R.'s ethnically, religiously and culturally, may serve to justify the intervention of the Soviet Union in their behalf in accordance with general concepts of intervention on "grounds of humanity." It must be noted, too, that the first indications of Soviet designs on Eastern Galicia appeared in a *Pravda* editorial violently attacking the Polish nationality policy, and stressing that the U.S.S.R. could not and would not remain indifferent to the fate of the Ukrainian and Byelorussian minorities within Poland.[30] This already established the line which the Soviet legal argument would follow a few days later.

However, not content with extending protection to kinsmen, the Soviet note of September 17, 1939, went a step further and, again exceeding the bounds of general international law, assumed to "extricate the Polish people from the unfortunate war into which they were dragged by their unwise

[28] C. G. Fenwick, International Law 242 (3rd ed., New York, 1948).
[29] The Polish White Book, pp. 189–190. [30] Pravda, Sept. 14, 1939, p. 1.

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

rulers, and to enable them to live a peaceful life." As formulated in the legal treatises of early Soviet authorities on international law, intervention by a revolutionary socialist state was justified as a "powerful weapon of progress, a surgical intervention helping the birth of a new world," which, while remaining in the hands of the bourgeoisie, was "the synonym of the deepest regression." [31] Though resolutely rejected by international public law, the idea of a "progressive intervention" survived in Soviet legal ideology [32] and seems to have been in Molotov's mind as an excuse for overstepping the legitimate bounds of intervention on "grounds of humanity." For to protect individuals towards whom one feels bonds of relationship is one thing, and might be justified in certain circumstances, but to protect a nation against its own legally chosen government, even if it were unwisely chosen, is another, and much harder to excuse.

V. National Self-Determination

Closely resembling the appeal to humanitarian considerations is another semi-moral, semi-legal concept, also used by the Soviet Union—national self-determination. In the Soviet case the principle of self-determination rests upon two factors: (1) the political unity of a people of a similar ethnic, linguistic, cultural and religious background within the framework of a single state; (2) the freely expressed choice of a people regarding its political existence.

Again and again, without any variations throughout the years, from 1939 until the present day, Soviet authors have given great prominence to the fact that the Soviet action in 1939 unified within one political unit all people of Ukrainian stock, and within another all persons of Byelorussian origin. It has been constantly reiterated that "the multinationality of the former Polish state was the main cause of its internal weakness," [33] and that the only possible solution of the problem was the unification of the Ukrainian and Byelorussian nations in their own states. This, it is claimed, is exactly what has been achieved by the incorporation of Western Ukraine and

[31] E. A. Korovin, Mezhdunarodnoe pravo perekhodnogo vremeni (International Law of the Period of Transition) 61 (2nd ed., Moscow, 1924). Though Korovin's theses were subjected to scathing criticism by Vyshinsky in a lecture read on July 16, 1938, Voprosy teorii gosudarstva i prava (Questions of Theory of State and Law) 98 (2nd ed., Moscow, 1949), the differentiation between progressive and reactionary intervention, whether consciously or not, was left untouched.

[32] In 1951, it was finally denounced in the textbook, Mezhdunarodnoe Pravo (International Law) 199 (Moscow, 1951, published by the Academy of Sciences of the U.S.S.R.), as "formalist-dogmatic" and "anti-scientific." The chief editor of this textbook was E. A. Korovin himself.

[33] E. Radetsky, "Zapadnaya Ukraina i Zapadnaya Byelorussiya" (Western Ukraine and Western Byelorussia), Mirovoe Khozyaistvo i Mirovaya Politika, November, 1939, No. 11, p. 86.

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

Western Byelorussia, respectively, into the Ukrainian and White Russian S.S.R.'s. "This act put an end to the historical injustice reigning since the time of the Treaty of Riga of 1921." [34]

> Henceforth an end has been put to the atomization of the Byelorussian nation. Throughout the entire land the Byelorussian nation is now gathered into one whole, and it may now be said that Byelorussia is entirely unified. The same can be said, too, of the Ukrainian nation, which in the course of many centuries was split into parts and survived a long period of the most brutal national oppression. Now the Ukrainian nation, too, throughout the land is gathered into one whole. The century-long aspirations of foremost sons of the Ukrainian nation, which had brought innumerable victims as a sacrifice on the altar of its national liberation, have been realized. Finally the time has come to say: henceforth the Ukraine is unified.[35]

When expressed in this form, however, the Soviet plea for national unification, though treated by Soviet authors as a question of national self-determination, does not properly qualify as such in general international law, either as conceived by Wilson or as subsequently interpreted and applied throughout Europe. It resembles more the political demand for the in-gathering by choice or by force of all individuals of a given ethnic origin within some greater Fatherland, for central to the generally held views on self-determination is not the problem of unification as such, but the problem of a freely expressed choice on a people's political destiny.

Simultaneously with expounding its own brand of national self-determination, therefore, the Soviet Union also reverted to invoking it in its *bona fide* form, as sanctioned by international public law. In this context the U.S.S.R. based its case on the plea that the disputed area in question was forcibly annexed by Poland in 1921, thus violating the basic principle of national self-determination, and that the plebiscite held in 1939, which resulted in the incorporation of Western Ukraine and Western Byelorussia into the Soviet Union was an expression of their population's voluntary choice concerning their political life.

Forcible annexation was stigmatized by no less a person than Lenin himself, who branded it as a violation of a nation's right to self-determination, as a form of national oppression, and rejected it as a policy unworthy of and unsuitable for a socialist state. He also unreservedly condemned and refused to recognize the legality of any territorial changes effected through annexation by force of arms.[36] According to Soviet legal doctrine, such territorial acquisitions are *ipso facto* invalid. In particular reference to the case of Western Ukraine and Western Byelorussia, the Soviet Union

[34] V. T. Fomin, Imperialisticheskaya agressiya protiv Polshi v 1939g (The Imperialistic Aggression against Poland in 1939) 163 (Moscow, 1952).

[35] V. Molotov, Report to the Moscow Soviet, November 6, 1939 (Moscow, 1939), p. 8.

[36] V. I. Lenin, Socheneniya (Works), Vol. 26, p. 218, and Vol. 22, p. 320.

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

contended that the original manner in which Poland acquired dominion over the area was in violation of international law, contrary to the legal principle of national self-determination, constituted an illegal and forcible annexation, and gave Poland no valid title to the territory.

Thus, the holding of the plebiscite, it was calculated, would both erase any remaining doubts concerning the validity of Polish claims to the area and establish a superior Soviet title based on the principle of national self-determination:

> In 1939, in accordance with the will of the population expressed in the form of a nation-wide balloting, Western Ukraine and Western Byelorussia, illegally torn away at an earlier date by feudal Poland, were once again re-united with the Ukrainian and White Russian S.S.R.'s.[37]

This, according to the Soviet interpretation of international law, firmly established Soviet title to the territory. In general international law, too, plebiscites play a rôle and have quite often served to transfer territories from one state to another, as was particularly so at the close of World War I. However, such plebiscites have always been held under neutral administration or supervision, never at a time when the disputed territory was militarily occupied by one of the interested parties. In the case of Western Ukraine and Western Byelorussia, the theory of the plebiscite as such or the appropriateness of its use are not questioned, but its legal validity and effect are seriously impaired not only because of the circumstances surrounding it, but also because of its failure to meet certain technical and legal requirements for its administration.

Though the practical importance of the plebiscite in this case may be discounted, theoretically the U.S.S.R. still retains a better claim than Poland to the incorporated territories on the basis of the principle of national self-determination, if the ethnic composition of the area's population is taken into account. For, though the Soviet title rests on a plebiscite of doubtful validity, the Polish one derives from a direct act of force and military conquest, not even remotely claiming parentage with the concept of national self-determination. On the whole it may perhaps be concluded, without running any great risk of criticism, that on this particular item the Soviet plea was, by and large, successful in carrying its point.

[37] S. V. Molodtsov, "Nekotorye voprosy territorii v mezhdunarodnom prave" (Some questions of territory in international law), Sovetskoe Gosudarstvo i Pravo, 1954, No. 8, p. 67; I.N. Malukevich, "Obrazovanie Polskogo Narodno-Demokraticheskogo Gosudarstva" (The formation of the Polish People's Democratic State), Proval imperialisticheskikh planov v otnoshenii Polshi v gody vtoroi mirovoi voiny (Collapse of the imperialistic plans concerning Poland during the Second World War) (ed. by N. Rubinshtein, Moscow, 1952), p. 115. For the same line of argument as used by contemporaries of the event, see E. Radetsky, *loc. cit.;* I. Lemin, *loc. cit.;* Molotov's report of Oct. 31, 1939.

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

VI. Spuriousness of the Polish Title to Eastern Galicia

Not satisfied with affirming its own legal rights to Eastern Galicia, the Soviet argument sought at the same time to undermine and, if possible, destroy the bases for Poland's title to the territory. To achieve this objective the Soviet course of action took the form of a three-pronged offensive aimed at: (1) denying the validity of all the treaties and agreements by which Poland's sovereignty over Eastern Galicia was consolidated; (2) branding Poland's acquisition of the area as an illegal forcible annexation or simple bandit-like theft of alien property; (3) proving that the Polish Administration was illegal, since it rested on oppression of national minorities and their exploitation.

The second point we have already considered and will not return to it. In essence, the first argument asserted that all the various international documents in which the U.S.S.R. recognized Poland's dominion over Eastern Galicia, and which regulated the relations between the two states from 1921 to 1939, were *diktats*. As such, according to authoritative Soviet legal sources, they were binding only insofar as they were upheld by the power relationship between the signatories, and once this relationship was upset, no moral or legal obligation remained to conform to their provisions.[38]

> So that it is considered that the annulment or violation of a *diktat* is a legal act, whereas the violation of a voluntarily signed treaty is an international *delict*.[39]

Thus the Polish title, deriving, according to the U.S.S.R., from imposed treaties or *diktats,* could not and did not survive Poland's collapse, legally leaving the Soviet Union free to reopen, repudiate or revise any and all questions of its past relations with Poland based on such agreements.

Simultaneously the U.S.S.R. attacked the substance of the Polish administration of the area, underlining the oppressive character of the Polish Government's treatment of the Ukrainian and Byelorussian elements of its population. This, the Soviet press implied,[40] discredited the Polish official policy and seriously put under question Poland's fitness to continue exercising sovereign powers over its minorities. As a result of the discriminations and mistreatments to which it subjected its minorities, as Soviet sources claimed, Poland forfeited all its rights to Eastern Galicia.

Conclusions

What conclusions may be drawn from this welter of claims and counterclaims which forms the body of the Soviet legal argument concerning its

[38] See A. I. Zuev, "Zakonnye prava Egipetskogo naroda" (The legal rights of the Egyptian nation), Sovetskoe Gosudarstvo i Pravo, 1952, No. 2, p. 61.

[39] V. P. Potemkin (ed.), Istoriya Diplomatii (History of Diplomacy), Vol. III, p. 813 (Moscow, 1945).

[40] Editorial in Pravda, Sept. 14, 1939, p. 1; and daily in the issues of Pravda and Izvestiya after Sept. 18, 1939.

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

rights to Western Ukraine and Western Byelorussia? What lessons can be learned from this record?

Even a rapid glance at the legal picture thus presented convinces one that the Soviet authorities could not have seriously intended their case for international lawyers. Nothing else can explain the reason why the Soviet legal experts mismanaged so badly, from every conceivable legal and technical viewpoint, the job of presenting a strong legal plea for Soviet rights to Western Ukraine and Western Byelorussia when they really were on solid ground and could have easily drafted an excellent legal case. The slovenliness of the Soviet presentation of its case has often been interpreted as proof of the inherent Soviet disdain for international law, and its reliance on brute force alone to achieve desired ends. To us this line of thought seems to be in error, for Soviet diplomats have, in defending more indefensible positions, shown amazing ingenuity, not to say virtuosity, in the use of legal technicalities.[41] The answer must be sought elsewhere.

The purpose of the Soviets in erecting this complex legal edifice was not, as has been sometimes asserted, to convince trained jurists of the justice of the Soviet cause, or, through the orderly development of a technically incontrovertible legal argument, to establish Soviet rights to Eastern Galicia. As a matter of fact, the very manner in which the Soviet case was presented by Molotov and his assistants would have counteracted any possible Soviet aspirations in that direction.

No, the Soviet objective was not to lay down in an unimpeachable legal plea the grounds for the Soviet Union's claims vis-à-vis Eastern Galicia, but, through use of semilegal terminology, to influence the public opinion of wide masses, both within the Soviet Union and outside its frontiers, and thus to gain support for its policies. All evidence points to this conclusion.

1. The use of a multiplicity of arguments aimed at appealing to a variety of tastes. Instead of concentrating on a few well-chosen points and building its case around them, as is the common practice in international public law, the Soviet Union dispersed its forces, even appealed to mutually contradictory rules, badly weakening the technical and legal strength of its case in the process; but, by so doing, it sought, and perhaps succeeded in swaying, the sympathies of broader masses of individuals.

2. The appeal to common sense and facts at the expense of technical niceties and fine legalisms, too, served an identical purpose. When the U.S.S.R. claimed that the Polish state and Government, in fact, ceased to exist, it was more concerned with convincing the man in the street than the versed lawyer.

3. Keeping always in view its objective of influencing mass public opinion, often more hardheaded and practical-minded than statesmen trained in

[41] Of which Vyshinsky's performance in the use of procedural rules in the United Nations Organization to tie up the meetings is the best, but not the only, illustration.

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

the law, the Soviet case at no time relied exclusively on the power of words alone and on legal arguments, however nice and technical they might be, if they stood unsupported by facts. Conversely, it never neglected to support with law any fact, however favorable to its cause, if it seemed to rest on power alone. Understanding that it could only win minds unversed in legal hair-splitting if it presented them with a practical exposé based, or purporting to be based, on solid facts, the Soviet Union always sought to bolster its legal points by an appeal to the facts of the case, and *vice versa.*

This explains why the question of timing was so important to the Soviet rulers in planning their moves. Ostensibly they could have mounted a verbal propaganda offensive based on mere fabrications in an effort to sell their policies, but we find them evaluating concrete circumstances, and then gearing to them their efforts to mobilize public support for the chosen course of action. The preoccupation with the facts of the case is evidenced by Molotov's anxiety to initiate the first step only when conditions were ripe, "at a suitable time," when Warsaw had fallen.[42]

It may be objected to this that if the Soviet intentions really were to "make the intervention of the Soviet Union plausible to the masses and at the same time avoid giving the Soviet Union the appearance of an aggressor," [43] the preparation of the political motivation for the Soviet action was in practice carried out in a rather offhand manner. After all, the first indications of Soviet designs appeared in *Pravda's* editorial of September 14, 1939,[44] scarely three days before the plan was put into execution, and nothing further appeared in press or radio until September 18. By Molotov's own admission, however, we know that "the Soviet Government was taken completely by surprise by the unexpectedly rapid German military successes," [45] and this may serve to explain the inadequacy of Soviet propaganda preparations. All available evidence points to the U.S.S.R.'s original intention to initiate action around September 11, 1939: Molotov assured the German Ambassador on September 9 that Soviet military action would take place within the next few days;[46] and—strange coincidence—the very note which was handed to the Polish Ambassador on September 17, 1939, read: "during the course of ten days' hostilities Poland has lost all her industrial areas and cultural centres," indicating

[42] Nazi-Soviet Relations, 1939–1941, pp. 87, 91, 93.

[43] *Ibid.*, p. 91.

[44] In spite of the assertions found in The Polish White Book, p. 210, that Pravda on Sept. 12, 1939, published a "leading article violently attacking the condition of our minorities in the eastern areas," repeated by M. Beloff, The Foreign Policy of Soviet Russia, 1929–1941, Vol. II, p. 281 (London, 1949), and modified by L. Noël, *op. cit.* 500, to read "*Pravda* for September 11, 1939," an examination of all Pravda issues from Sept. 11 to Sept. 17 failed to uncover any such article except the one in the Sept. 14, 1939, issue already mentioned.

[45] Nazi-Soviet Relations, 1939–1941, p. 91. [46] *Ibid.*, p. 90.

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions

that the text of the note may have been drafted on September 11, 1939, and used six days later without anyone bothering to revise it.

In view of the circumstances of the case, it is quite clear that for the Soviet Union international law plays only one rôle, but an important one at that, the rôle of a propaganda tool supporting its political moves and giving them the appearance of plausibility and quasi-legality. This does not indicate by any means that the Soviets discount the importance of international law. Of all hitherto existing modern totalitarian regimes, the U.S.S.R. has been the one to show the most attention to legal questions and has given by far the highest proof of legal consciousness. Soviet representatives and officials show great awareness of the importance of international law, a weapon which, when judiciously used (and it must be admitted that the Soviet use of it has been extremely skillfull), can prove of great weight in the battle for human minds. In the course of this struggle the U.S.S.R., as has been shown by the case of Eastern Poland, brought international law out of the chancelleries and into the streets.

In conclusion, as a mere aside, it may perhaps prove interesting, given the Soviet habit of rewriting history, to trace the subsequent fate of the various arguments advanced by Molotov in September, 1939. The plea of *debellatio* was the first to be discarded, lasting scarcely six weeks. Having achieved the desired effect, Molotov could triumphantly proclaim on October 31, 1939, that

> a short jab at Poland first by the German army, and then by the Red Army was enough to wipe out all traces of this ugly creation of the Versailles Treaty.

Thus was put to rest the convenient but troublesome legal fiction which constituted Point 1 of the Soviet case.

While still mentioning the plea for national self-determination when writing about the events of September, 1939, Soviet publicists, with the wisdom of hindsight, have given particular prominence to the argument that the Soviet action in occupying Poland's Eastern marches created an "Eastern front" against the common enemy, Hitler, and thus served the interests of the United Nations, all peace-loving nations, the populations of the area threatened with enslavement by the German Army, and, last but not least, Poland herself.[47] This explanation now constitutes the favorite theme-song of Soviet apologists, and will, in all probability, so remain until new historical circumstances impose new requirements on writers of Soviet legal treatises.

[47] In particular, see Falsifiers of History (A Historical Survey) 42–43 (Moscow 1948), and the leading editorial, "O Mezhdunarodnoi Organizatsii Bezopasnosti" (On the International Security Organization), Voina i Rabochii Klass, Oct. 15, 1944, No. 20.

This content downloaded from 128.226.37.5 on Mon, 04 Jan 2016 23:47:03 UTC
All use subject to JSTOR Terms and Conditions